

1 HOWARD Z. ROSEN, State Bar No. 54442
hzrosen@posner-rosen.com
2 JASON C. MARSILI, State Bar No. 233980
jmarsili@posner-rosen.com
3 BRIANNA M. PRIMOZIC, State Bar No. 274397
bprimozic@posner-rosen.com
4 AMANDA PITROF, State Bar No. 307530
apitrof@posner-rosen.com

5 POSNER & ROSEN LLP
6 3600 Wilshire Blvd., Suite 1800
Los Angeles, CA 90010-2679

7 Telephone No. (213) 389-6050
8 Facsimile No. (213) 389-0663

9 Attorneys for Plaintiff
JOSEPH C. MCNICHOLAS

11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13 **WESTERN DIVISION**

15 JOSEPH C. MCNICHOLAS, an
individual,

16 Plaintiff,

17 v.

18 LOYOLA MARYMOUNT
19 UNIVERSITY,

20 Defendant.

) CASE NO.

) **COMPLAINT FOR DAMAGES**

-) 1. FMLA Interference
) 2. FMLA Retaliation
) 3. CFRA Interference
) 4. CFRA Retaliation
) 5. Wrongful Termination in Violation
of Public Policy
) 6. Violation of Labor Code § 1102.5

) **DEMAND FOR JURY TRIAL**

22
23
24 COMES NOW Plaintiff JOSEPH C. MCNICHOLAS as against Defendant
25 Loyola Marymount University and alleges the following claims for relief:
26
27
28

1 **JURISDICTION**

2 1. Jurisdiction of this Court is invoked pursuant to Section 101 *et seq.* of
3 the Family and Medical Leave Act of 1993 (“FMLA”), 29 U.S.C. § 2601 *et seq.*
4 Subject matter jurisdiction over Plaintiff’s FMLA claim is proper pursuant to 28
5 U.S.C. § 1331.

6 2. As set forth in paragraphs 50 through 72, inclusive, Plaintiff’s related
7 state law claims arise out of a common nucleus of operative facts and form part of
8 the same case or controversy such that Plaintiff would be expected to try all his
9 claims in a single judicial proceeding. Accordingly, supplemental jurisdiction over
10 Plaintiff’s related state law claims is proper pursuant to 28 U.S.C. § 1367(a).

11 **VENUE**

12 3. Venue is proper in the Central District of California pursuant to 28
13 U.S.C. § 1391(b)(2) as the events giving rise to Plaintiff’s claims occurred in Los
14 Angeles, California.

15 **PARTIES**

16 4. Plaintiff Joseph C. McNicholas (“Plaintiff” or “McNicholas”) is and,
17 at all times relevant hereto, was a resident of the State of California residing in the
18 city of Santa Monica, California.

19 5. Defendant Loyola Marymount University (“LMU”) is a private
20 Catholic university located in Los Angeles, California that, at all times relevant
21 herein, has employed, and continues to employ, not less than 50 employees at its
22 Los Angeles, California campus.

23 **GENERAL ALLEGATIONS**

24 6. In or about March 2006, LMU hired McNicholas as the Associate
25 Director of the Office of Research and Sponsored Projects (“ORSP”). LMU
26 promoted McNicholas to Director of the ORSP in 2010, a position he held until he
27 was terminated, effective June 3, 2016.

28 7. The mission of the ORSP is to assist grant writers to secure funding

1 for research and teaching. McNicholas performed outstandingly as the Director of
2 ORSP as evidenced by his excellent performance reviews, the increase in grants
3 awarded to LMU faculty during his tenure, and LMU's own description of
4 McNicholas' accomplishments as Director of the ORSP.

5 8. McNicholas' performance reviews are outstanding. His 2014-2015
6 Performance Review, which is his most recent review, covers the period June 1,
7 2014 to May 31, 2015. In the 2014-2015 Performance Review, LMU rated
8 McNicholas as "Excellent" in the categories of Budgets/Cost, Customer Focus, Job
9 Knowledge, and Problem Solving/Analysis, and "Highly Proficient" in all of the
10 other categories.

11 9. McNicholas' 2013-2014 Performance Review is of similar quality.
12 LMU rated McNicholas as "Excellent" in the categories of Diversity, Planning,
13 Adaptability/Flexibility, Communication, Creativity/Innovation, Customer Focus,
14 Initiative, Job Knowledge, Leadership, Problem Solving/Analysis, Productivity,
15 and Strategic Thinking. LMU rated Dr. McNicholas as "Highly Proficient" in all
16 of the other categories.

17 10. The most definitive measurement of McNicholas' performance as
18 Director of the ORSP is the increase in the grant dollars awarded that occurred
19 during his tenure. From 2010, when McNicholas became the Director of the
20 ORSP, to June 2016, the grant dollars awarded to LMU faculty increased from \$2.8
21 million to \$8.4 million.

22 11. The Office of the Vice President for Intercultural Affairs designated
23 McNicholas as a 2014-2015 Senior Vice President Fellow in the Division of
24 Business and Finance. In so doing, LMU described McNicholas' contribution to
25 the funding process as follows:

26 Since arriving at LMU in 2006, Joseph [McNicholas] has
27 promoted a positive environment for the pursuit of
28 funding through streamlining grant submissions;

1 attracting talented people; communicating clearly about
2 funding opportunities; supporting a culture of
3 compliance; and advancing the teacher-scholar model.

4 12. McNicholas began an LMU-approved Family Medical Leave Act
5 (“FMLA”) and California Family Rights Act (“CFRA”) leave of absence on August
6 24, 2015.

7 13. McNicholas returned to his position as Director of the ORSP on or
8 about November 11, 2015.

9 14. Prior to the commencement of his FMLA/CFRA leave of absence,
10 McNicholas was the chair of the hiring committee for the ORSP. In that capacity,
11 McNicholas chaired the hiring committees for Alice Martini-Doyle, Assistant
12 Director, Pre-Award Services, for Cynthia Ruiz, Assistant Director, Pre-Award
13 Services, Emma Pastrana, Administrative Assistant, and for Ashley Alexander,
14 Grants and Contract Specialist.

15 15. The Director of ORSP who preceded McNicholas hired him and also
16 was the hiring committee chair for positions filled during her tenure.

17 16. During McNicholas’ leave of absence, John Carfora, Associate
18 Provost, Research Advancement and Compliance, and McNicholas’ immediate
19 supervisor during McNicholas’ tenure as Director of the ORSP, appointed Cynthia
20 Ruiz, a member of McNicholas’ staff, to chair the ORSP hiring committee and
21 announced that Ruiz would continue in that capacity after McNicholas’ returned
22 from his leave of absence.

23 17. Carfora did not rescind his proclamation that McNicholas would no
24 longer be the chair of the ORSP hiring committee upon his return from his leave of
25 absence.

26 18. Carfora permanently removed McNicholas as the hiring committee
27 chair, a position that he had held since becoming the Director of the ORSP in 2010.
28 The removal of McNicholas as the chair of the ORSP hiring committee was a

1 diminution in McNicholas' authority as Director of the ORSP and sent a clear
2 message to his staff that he was no longer fully in charge of the ORSP.

3 19. During McNicholas' leave, Carfora also gave Ruiz additional duties
4 that had been performed by McNicholas for his staff. Carfora reassigned staff
5 time-sheet approvals and one of McNicholas' supervisory roles to Ms. Ruiz during
6 his absence, but did not reassign these responsibilities to McNicholas, as Director
7 of the ORSP after he returned from his leave.

8 20. Time-sheet approvals has always been a supervisory responsibility of
9 the Director. The Director is tasked with performing the annual performance
10 evaluations for his staff. Whether and to what extent his staff perform their
11 assigned tasks is ultimately his responsibility. Ruiz is not a supervisor and her job
12 description does not include supervisory responsibilities. The removal of this
13 supervisory function from McNicholas was another reduction of his duties and
14 authority over the employees he supervised.

15 21. These actions by Carfora undermined McNicholas' authority as the
16 Director of the ORSP and are a direct result of, and in retaliation for, McNicholas
17 having taken a FMLA/CFRA leave of absence.

18 22. While McNicholas was on his leave of absence, Carfora was "very
19 stressed out" because McNicholas was gone. McNicholas is informed and believes
20 and based upon such information and belief alleges that Carfora also commented to
21 others that he "isn't paid enough to do two jobs." Carfora told McNicholas that it
22 was difficult for him to be involved in the ORSP while doing his own work.
23 Carfora only spent two days in the ORSP suite of offices in McNicholas' absence.

24 23. Carfora's retaliation against McNicholas for taking an FMLA/CFRA
25 leave is evidenced by both his comments to others, his statement to McNicholas,
26 his removal of McNicholas as the chair of the ORSP hiring committee, and the
27 transfer of the time-sheet approval and other supervisory roles from McNicholas to
28 his subordinate who is not a supervisor.

1 24. The retaliation is also evidenced by Carfora's change in the structure
2 and function of the ORSP as evidenced by the Carfora's Work Plan for
3 McNicholas.

4 25. Carfora made these unilateral and demeaning changes to further
5 emasculate McNicholas and his authority over his staff.

6 26. The ORSP has functioned at the highest level and has generated a
7 three-fold increase in grant revenue since McNicholas became its Director.

8 27. By making his changes to the ORSP during the first week of
9 McNicholas' return to work from his leave, Carfora has further threatened changes
10 to McNicholas' responsibilities and further reductions in his authority.

11 28. McNicholas sent a November 13, 2015 letter to Executive Vice
12 President and Provost Joseph B. Hellige in which he delineated the acts of
13 interference and asserted that Carfora's actions appeared to be in retaliation for
14 McNicholas having taken FMLA/CFRA leave.

15 29. Provost Hellige did not address the issues raised by McNicholas, but
16 instead responded, in part: "[A]s an initial response to your concerns regarding the
17 assignment of duties, management has the right to assign or reassign job duties to
18 meet the operational needs of the Office." Provost Hellige did not explain why
19 removal and replacement of McNicholas as the chair of the ORSP hiring committee
20 and removal and transfer of his authority to his assistant, who is not a supervisor,
21 was necessary for the operational needs of the ORSP.

22 30. Carfora and McNicholas met on March 30, 2016 to discuss issues
23 concerning the ORSP. From the beginning of the meeting, Carfora was dismissive,
24 aggressive, defensive, and belittling. Just one example is emblematic of Carfora's
25 demeanor. The first item that McNicholas raised with Carfora was returning his
26 responsibilities for time sheet approval, performance reviews, and "concur," the
27 office system used to manage the budget. Carfora stated that he was going to wait
28 and that it was not going to happen presently. McNicholas asked when he thought

1 they would revisit that decision. Carfora grew angry and shouted: “When I am
2 goddamned ready!” This is just one of many examples of Carfora’s demeaning
3 attitude towards McNicholas that was exacerbated by McNicholas’ having taken
4 FMLA leave.

5 31. Provost Michael O’Sullivan notified McNicholas that he was
6 terminated. The termination was effective June 3, 2016.

7 32. LMU used McNicholas’ FMLA-approved leave as a negative factor in
8 its decision to terminate him.

9 33. On January 12, 2017, Plaintiff McNicholas filed a complaint of
10 discrimination with the Department of Fair Employment and Housing (“DFEH”).

11 34. On January 12, 2017, McNicholas received a Right-To-Sue letter from
12 the DFEH.

13
14 **FIRST CLAIM FOR RELIEF**
(FMLA Interference Against LMU)

15 35. Plaintiff realleges and incorporates by reference, as though fully set
16 forth herein, paragraphs 1 through 32, inclusive.

17 36. At all times relevant hereto, Section 2615 of Title 29 of the United
18 States Code was in full force and effect and was binding upon LMU. Section
19 2615(a)(1) prohibits employers from interfering with, restraining, or otherwise
20 denying the exercise of or the attempt to exercise any right provided under the
21 FMLA.

22 37. As interpreted by the United States Court of Appeals for the Ninth
23 Circuit, Section 2615(a)(1) applies to an employee who takes FMLA leave and, as
24 a consequence, is subjected to discharge by his employer. *Xin Liu v. Amway Corp.*,
25 347 F.3d 1125, 1133 n.7 (9th Cir. 2003); *Bachelder v. America West Airlines, Inc.*,
26 259 F.3d 1112, 1124 (9th Cir. 2001).

27 38. McNicholas had been employed by LMU since March 2000 and
28 provided more than 1,250 hours service to LMU from the campus of LMU in Los

1 Angeles, California in the 12-month period immediately preceding June 3, 2016.

2 39. As alleged in Paragraphs 12-13, inclusive, McNicholas took an LMU-
3 approved FMLA leave of absence from August 24 to November 11, 2015.

4 40. As alleged in Paragraphs 16 through 19, inclusive, LMU reduced
5 McNicholas' duties and responsibilities as Director of the ORSP while he was on
6 his FMLA/CFRA leave and did not reinstate those duties and responsibilities upon
7 his return from his leave.

8 41. After McNicholas protested the diminution of his duties and
9 responsibilities and the interference by Carfora in McNicholas' direction of the
10 ORSP, LMU terminated McNicholas, effective June 3, 2016.

11 42. LMU used McNicholas' FMLA/CFRA-approved leave as a negative
12 factor in its decision to terminate him.

13 43. The discharge of McNicholas constitutes an interference with this
14 rights under the FMLA.

15 44. The conduct alleged in paragraphs 16 through 30, 40-43, inclusive,
16 was a substantial factor in causing damage and injury to McNicholas.

17
18 **SECOND CLAIM FOR RELIEF**
(FMLA retaliation against LMU)

19 45. Plaintiff realleges and incorporates by reference, as though fully set
20 forth herein, paragraphs 1 through 41, inclusive.

21 46. At all times relevant hereto, Section 2615 of Title 29 of the United
22 States Code was in full force and effect and was binding upon Defendants. Section
23 2615(a)(2) prohibits employers from discharging an employee because the
24 employee for opposed any practice prohibited by the FMLA.

25 47. As alleged in paragraph 28, McNicholas sent a November 13, 2015
26 letter to Executive Vice President and Provost Joseph B. Hellige in which he
27 opposed the actions of Carfora in reducing his duties and responsibilities and
28 asserted that Carfora's actions appeared to be in retaliation for his having taken

1 FMLA leave.

2 48. LMU discharged McNicholas in retaliation for opposing Carfora's
3 violation of McNicholas' rights under the FMLA in violation of 29 U.S.C. section
4 2615(a)(2).

5 49. The conduct alleged in paragraph 16 through 30, 41-42, and 47-48,
6 inclusive, was a substantial factor in causing damage and injury to McNicholas.

7
8 **THIRD CLAIM FOR RELIEF**
(CFRA Interference Against LMU)

9 50. Plaintiff realleges and incorporates by reference, as though fully set
10 forth herein, paragraphs 1 through 43, inclusive.

11 51. At all times herein mentioned, Government Code section
12 12945.2(l)(1)) was in full force and effect and was binding upon LMU. Section
13 12945.2(l)(1) requires LMU to refrain from discriminating against or discharging
14 an employee based upon his exercise of his right to take family care and medical
15 leave provided by subsection (a).

16 52. LMU used McNicholas' leave of absence, which had been approved
17 under the California Family Rights Act, Government Code section 12945.2, as a
18 negative factor in its decision to terminate him.

19 53. The conduct alleged in paragraphs 16 through 31, inclusive, was a
20 substantial factor in causing damage and injury to McNicholas.

21
22 **FOURTH CLAIM FOR RELIEF**
(CFRA Retaliation Against LMU)

23 54. Plaintiff realleges and incorporates by reference, as though fully set
24 forth herein, paragraphs 1 through 34, inclusive.

25 55. At all times herein mentioned, Government Code section
26 12945.2(l)(1)) was in full force and effect and was binding upon LMU. Section
27 12945.2(l)(1) requires LMU to refrain from discriminating against or discharging
28 an employee based upon his exercise of his right to take family care and medical

1 leave provided by subsection (a).

2 56. At all times relevant hereto, McNicholas was qualified to, and did
3 satisfactorily, perform the essential duties of his job as the Director of ORSP.

4 57. As alleged in paragraphs 31 and 41, McNicholas suffered an adverse
5 employment action when LMU discharged McNicholas for having opposed LMU's
6 discrimination against him for having taken his leave provided by Section 12945.2.

7 58. As alleged in paragraphs 31 and 41, McNicholas suffered an adverse
8 employment action when LMU terminated McNicholas.

9 59. The conduct alleged in paragraphs 16 through 32, and 57-58,
10 inclusive, was a substantial factor in causing damage and injury to McNicholas in
11 an amount in excess of the jurisdictional requirement of this Court.

12 60. LMU has acted for the purpose of causing McNicholas to suffer
13 financial loss and is guilty of oppression and malice, justifying an award of
14 exemplary damages.

15 **FIFTH CLAIM FOR RELIEF**

16 (Wrongful Termination in Violation of Public Policy Against LMU)

17 61. Plaintiff realleges and incorporates by reference, as though fully set
18 forth herein, paragraphs 1 through 60, inclusive.

19 62. The public policy of the State of California is codified in Government
20 Code section 12945.2 as well as through the provisions of the FMLA, which
21 represents the federal counterpart to the CFRA. Both of these aforementioned
22 statutes were in full force and effect and were binding upon LMU at all times
23 relevant hereto.

24 63. McNicholas was the Director of the ORSP and suffered an adverse
25 employment action when LMU terminated him in violation of the FMLA and the
26 CFRA.

27 64. The conduct alleged above constitutes wrongful termination in
28 violation of public policy.

1 65. The termination of McNicholas was a substantial factor in causing
2 damage and injury to McNicholas in an amount in excess of the jurisdictional
3 requirement of this Court.

4 66. LMU acted for the purpose of causing McNicholas to suffer financial
5 loss and is guilty of oppression and malice, justifying an award of exemplary
6 damages.

7
8 **SIXTH CLAIM FOR RELIEF**

9 (Violation of Labor Code section 1102.5 Against LMU)

10 67. Plaintiff realleges and incorporates by reference, as though fully set
11 forth herein, paragraphs 1 through 60, inclusive.

12 68. Labor Code section 1102 was in full force and effect and was binding
13 upon LMU. Section 1102.5 requires LMU to refrain from retaliating against an
14 employee for disclosing information to his employer if the employee has
15 reasonable cause to believe that the information discloses a violation of state or
16 federal law or a violation of or noncompliance with a local, state, or federal rule or
17 regulation.

18 69. As alleged in Paragraph 28, McNicholas sent a November 13, 2015
19 letter to Executive Vice President and Provost Joseph B. Hellige in which he
20 delineated the acts of interference with his rights under the FMLA and the CFRA
21 and asserted that Carfora's actions appeared to be in retaliation for his having taken
22 FMLA leave.

23 70. On or about June 3, 2016, LMU discharged McNicholas for having
24 disclosed to LMU the violation of his rights under the FMLA and the CFRA, which
25 discharge constituted a violation of Labor Code section 1102.5.

26 71. The termination of McNicholas was a substantial factor in causing
27 damage and injury to McNicholas in an amount in excess of the jurisdictional
28 requirement of this Court.

 72. LMU acted for the purpose of causing McNicholas to suffer financial

1 loss and is guilty of oppression and malice, justifying an award of exemplary
2 damages.

3 WHEREFORE, Plaintiff JOSEPH MCNICHOLAS prays for judgment
4 against Defendants, and each of them, as follows:

5 **As to the First Claim for Relief:**

6 1. For lost wages, employment benefits, and other compensation
7 pursuant to 29 U.S.C. § 2617(a)(1)(A)(i)(I);

8 2. For prejudgment interest pursuant to 29 U.S.C. § 2617(a)(1)(A)(ii);

9 3. For liquidated damages pursuant to pursuant to 29 U.S.C. §
10 2617(a)(1)(A)(iii);

11 4. For reasonable attorney's fee, reasonable expert witness fees, and
12 other costs of the action pursuant to 29 U.S.C. § 2617(a)(3);

13 **As to the Second Claim for Relief:**

14 5. For lost wages, employment benefits, and other compensation
15 pursuant to 29 U.S.C. § 2617(a)(1)(A)(i)(I);

16 6. For prejudgment interest pursuant to 29 U.S.C. § 2617(a)(1)(A)(ii);

17 7. For liquidated damages pursuant to pursuant to 29 U.S.C. §
18 2617(a)(1)(A)(iii);

19 8. For reasonable attorney's fee, reasonable expert witness fees, and
20 other costs of the action pursuant to 29 U.S.C. § 2617(a)(3);

21 **As to the Third Claim for Relief:**

22 9. For general damages according to proof;

23 10. For special damages for lost earnings according to proof;

24 11. For attorney's fees, reasonable expert witness fees, and other costs
25 pursuant to Government Code section 12965(b) and/or any other applicable
26 provision of law;

27 12. For prejudgment interest pursuant to Civil Code section 3287 and/or
28 any other provision of law providing for prejudgement interest;

1 13. For punitive damages according to proof;

2 **As to the Fourth Claim for Relief:**

3 14. For general damages according to proof;

4 15. For special damages for lost earnings according to proof;

5 16. For attorney's fees, reasonable expert witness fees, and other costs
6 pursuant to Government Code section 12965(b) and/or any other applicable
7 provision of law;

8 17. For prejudgment interest pursuant to Civil Code section 3287 and/or
9 any other provision of law providing for prejudgement interest;

10 18. For punitive damages according to proof;

11 **As to the Fifth Claim for Relief:**

12 19. For general damages according to proof;

13 20. For special damages for lost earnings according to proof;

14 21. For prejudgment interest pursuant to Civil Code section 3287 and/or
15 any other provision of law providing for prejudgement interest;

16 22. For punitive damages according to proof;

17 **As to the Sixth Claim for Relief:**

18 23. For general damages according to proof;

19 24. For special damages for lost earnings according to proof;

20 25. For a penalty not exceeding ten thousand dollars (\$10,000) for each
21 violation of Labor Code section 1102.5 pursuant to Labor Code section 1102.5(f);

22 26. For prejudgment interest pursuant to Civil Code section 3287 and/or
23 any other provision of law providing for prejudgement interest;

24 27. For punitive damages according to proof;

25 ///

26 ///

27 ///

28

As to All Claims for Relief:

28. For cost of suit incurred herein;

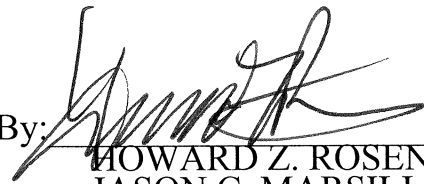
29. For attorney's fees as provided by law;

30. For prejudgment interest as provided by law; and

31. For such other and further relief as the Court may deem just and proper.

DATED: January 17, 2017

POSNER & ROSEN LLP

By: 

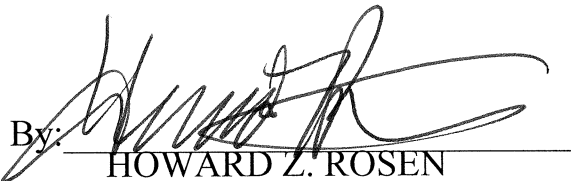
HOWARD Z. ROSEN
JASON C. MARSILI
BRIANNA M. PRIMOZIC
AMANDA PITROF
Attorneys for Plaintiff
JOSEPH MCNICHOLAS

DEMAND FOR JURY TRIAL

Plaintiff JOSEPH MCNICHOLAS hereby demands a jury trial on all claims
for relief.

DATED: January 17, 2017

POSNER & ROSEN LLP

By: 
HOWARD Z. ROSEN
JASON C. MARSILI
BRIANNA M. PRIMOZIC
AMANDA PITROF
Attorneys for Plaintiff
JOSEPH MCNICHOLAS